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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decision

(T.D. 92–108)

INTERPRETIVE RULE CONCERNING THE TERM "SUBSTANTIALLY ENCIRCLE" AS IT RELATES TO "FOXING AND FOXING-LIKE BANDS" ON IMPORTED FOOTWEAR

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Interpretative rule concerning the term "substantially encircle" as it relates to "foxing and foxing-like bands" on imported footwear.

SUMMARY: This document sets forth Customs position regarding the interpretation of the term "substantially encircle" as it relates to "foxing and foxing-like bands" on imported footwear. Footwear which possesses a foxing or foxing-like band is subject to a higher rate of duty than footwear not possessing this feature. As a change in the interpretation of "substantially encircle" will affect the duty charged to imported footwear, comments from the domestic manufacturers of footwear as well as the footwear importing community were requested by notice published in the CUSTOMS BULLETIN on June 3, 1992. The comments were carefully considered prior to determining that our existing interpretation need not be changed.

EFFECTIVE DATE: November 25, 1992.

FOR FURTHER INFORMATION CONTACT: Kathleen C. Clarke, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Ave., N.W., Washington, D.C. 20229, (202) 482–7030.

BACKGROUND

After careful consideration of numerous comments submitted by footwear importers and domestic shoe industry, by a document published as T.D. 83–116 in the Federal Register of May 23, 1983 (48 Fed. Reg. 22904, 17 Cust. Bull. 229 (1983)), the Customs Service set forth:

(1) Customs position regarding the proper interpretation of the provision in the Tariff Schedules of the United States (TSUS) pertaining to imported footwear having foxing or a foxing-like band ap-

plied or molded at the sole and overlapping the upper, and (2) guidelines relating to the characteristics of foxing and a foxing-like band.

Even though the TSUS was superseded by the Harmonized Tariff Schedule of the United States (HTSUS), effective January 1, 1989, the guidelines of T.D. 83–116 are still followed by Customs with regard to the classification of footwear.

T.D. 83–116 set forth guidelines relating to the characteristics of foxing and a foxing-like band as follows:

CHARACTERISTICS OF A FOXING

1. A foxing is a strip of material which is separate from the sole and upper.
2. A foxing secures the joint between the sole and upper. It covers the joint but there may be other footwear with a "foxing under" which does not cover the joint as in the B.F. Goodrich definition of foxing previously cited.
3. A foxing must overlap the upper and the overlap must be readily discernible.
4. A foxing is a band, i.e., a strip serving to join, hold together or integrate two or more things * * * a thin, flat encircling strip, strap, or flat belted material serving chiefly to bind or contain something.
5. A foxing must encircle or substantially encircle the entire shoe.
6. A foxing may be attached by cementing, stitching, or vulcanizing.
7. A foxing does not include components known by another name clearly recognized in the trade such as mock welts, toe bumpers, wedge wraps, and platform wraps.
8. However, a mud guard may meet the definition of a foxing. It is usually applied at the sole and folded under at the juncture of the sole and upper and it does extend upward overlapping the upper. It also acts to reinforce or supplement the juncture of the sole and upper.

CHARACTERISTICS OF A FOXING-LIKE BAND

1. The term "foxing-like" applies to that which has the same, or nearly the same appearance, qualities, or characteristics as the foxing appearing on the traditional sneaker or tennis shoe.
2. A foxing-like band need not be a separate component.
3. A foxing-like band may or may not secure the joint between the sole and upper.
4. A foxing-like band must be applied or molded at the sole and must overlap the upper.
5. A foxing-like band must encircle or substantially encircle the entire shoe.
6. A foxing-like band may be attached by any means.
7. Unit molded footwear is considered to have a foxing-like band if a vertical overlap of 1/4 inch or more exists from where the upper and the outsole initially meet, measured on a vertical plane. If this vertical over-

lap is less than 1/4 inch, such footwear is presumed not to have a foxing-like band.

The "40–60" rule, as it is referred to, is a measurement used by Customs import specialists to assist in making a determination pertaining to encirclement. Generally, under this rule, an encirclement of less than 40% of the perimeter of the shoe by the band does not constitute foxing or a foxing-like band. An encirclement of between 40% to 60% of the perimeter of the shoe by the band may or may not constitute a foxing or a foxing-like band depending on whether the band functions or looks like a foxing. An encirclement of over 60% of the perimeter of the shoe by the band is always considered substantial encirclement.

ANALYSIS OF COMMENTS

Ten (10) comments were received in response to the notice published in the CUSTOMS BULLETIN on June 3, 1992. Six (6) from domestic manufacturers of footwear and four (4) from the footwear importing community. Four (4) of the comments, two from domestics and two from importers, contained substantive legal arguments. The other six comments were general in nature and contained little or no substantive legal arguments.

I. *Domestic Manufacturers:*

The domestic manufacturers request that Customs retain the present 40–60% rule when interpreting whether a foxing or foxing-like band "substantially encircles" the footwear or move to a 30–50% rule which they state is sufficient to constitute a functional foxing band based on improvements in footwear industries materials, adhesives and technology. The domestic manufacturers are concerned that any one objective percentage requirement (*i.e.*, 51%) for encirclement risks ignoring whether the encirclement in a shoe is functionally "substantial."

They also request that Customs enforce the width measurements for bands, *i.e.*, 1/4 inch on adult shoes, 3/16 inch on children shoes, and 1/8 inch on infant shoes, which are found in T.D. 83–116 and Headquarters Ruling Letter (HRL) 088510 dated April 29, 1991. They also request that Customs not examine the sole of the shoe before it is attached to the upper, as most soles are turned up when attached to the upper. Each domestic manufacturer has requested that Customs not change to the proposed 51% rule.

II. *Footwear Importers:*

The footwear importers state that the proposed 51% rule is inadequate and propose a 60% or 75% encirclement requirement as a standard. They state that 51% is "substantial encirclement", but is still too small an encirclement to qualify as a foxing within the meaning of T.D. 83–116. They believe that the 40–60% rule is being implemented by Customs as a 40% rule, *i.e.*, if the foxing and foxing-like band covers as much as 40% of the total circumference then Customs judges that the footwear has a foxing and applies the higher duty rate. They contend that the

40–60% rule is a purely subjective analysis without national standards or uniform application.

The footwear importers state that it is imperative that they have an objective standard to rely on in order to accurately determine pricing. They contend that "substantial encirclement":

(1) should mean to surround it in the main; or
(2) is comparable to the "substantially complete" test for unfinished articles in *Daisy Heddon, Div. Victor Comptometer Corp. v. United States,* 66 CCPA 97, C.A.D. 1228 (1979).

CUSTOMS SERVICE POSITION

After careful consideration of all the comments, a review of Customs implementation of the 40–60% rule and a review of Customs rulings, a change in Customs present interpretation of the term "substantially encircle" as it relates to "foxing and foxing-like bands" and the 40–60% rule is not necessary at this time.

Various definitions of "substantial" were submitted by both the domestic manufacturers and the footwear importers regarding how much of an encirclement is "substantial." It is Customs position that no definition of the word "substantial" requires a determination that the band encircle 51% or 75% of the perimeter of the shoe to be considered "foxing or a foxing-like band." Webster's New Collegiate Dictionary (1974) defines the word "substantial" as follows:

1c: important, essential
2: ample to satisfy and nourish
3b: considerable in quantity: significantly large
5: being largely, but not wholly that which is specified.

The unabridged version of the Random House Dictionary of the English Language defines the same word in the following terms:

1. of ample or considerable amount, quantity, size, etc.
2. of a corporal or material nature; real or actual.
7. pertaining to the substance, matter, or material of a thing.
8. of or pertaining to the essence of a thing; essential, material or important.

One of the definitions for the term in Black's Law Dictionary, Fourth Edition, is "Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable.

It is noted that none of the definitions actually quantify "substantial." It is always expressed in other terms which clearly convey the meaning. Certainly, a 40% encirclement is a substantial encirclement of the perimeter of the shoe in that it conforms exactly to the dictionary definitions of "substantial" by being ample, considerable in quantity, significantly large and largely, but not wholly that which is specified.

From the information gathered, Customs is uniformly applying the guidelines in T.D. 83–116. However, it appears that the footwear trade

has some misunderstandings of Customs methodology in examining whether footwear possess a foxing or foxing-like band. The footwear importers assert that Customs analysis of the 40–60% rule is purely subjective without national standards or uniform application. In addition, they contend that the 40–60% rule is being implemented by Customs as a 40% rule, *i.e.*, if a foxing or foxing-like band encircles 40% of the total circumference of the shoe then Customs finds that the footwear has a foxing and applies the higher duty rate.

While we believe that this contention is incorrect, Customs recognized that footwear importers and domestic manufacturers should be more fully aware of the analysis performed by Customs in making its determination as to the existence of a foxing-like band. Accordingly, this document sets forth Customs methodology in examining whether footwear possess a foxing-like band.

The 40–60% rule does not mean that encirclement of just over 40% of the perimeter of the shoe mandates a finding that foxing or foxing-like band exists. Customs examines other criteria while determining the existence of a foxing or foxing-like band.

For a foxing-like band to be found on footwear other than "unit molded" footwear, the sole must overlap the upper by more than 1/16 inch. Any amount of 1/16 inch or less is considered a "cupping radius" which does not constitute an overlap necessary to create a foxing-like band.

"Unit molded" footwear is considered to have a foxing-like band if a vertical overlap of a 1/4 inch or more exists from where the upper and the outsole initially meet, measured on a vertical plane. *See,* T.D. 83–116. However, HRL 088510 dated April 29, 1991, modified the 1/4 inch overlap measurement for children's and infants' shoes. HRL 088510 held that children's shoes having an overlap of 3/16 inch or more and infants' shoes having an overlap of 1/8 inch or more constitutes an overlap for purposes of determining whether a foxing or foxing-like band exists. The rationale for this position is that those shoes which were proportionately smaller than adults' would not have a 1/4 inch overlap even though they were identical to adult shoes which clearly had foxing because of the amount of their overlap. Thus, the overlaps necessary to be considered foxing-like bands on children's and infants' shoes should be expected to vary from just under 1/4 inch down to something above *de minimis.*

It should be noted that "unit molded" footwear encompasses two distinct manufacturing processes. In pre-molded construction, a preformed molded unit sole is separately attached to the upper after lasting. In direct molding, the molded sole is, at the time of its formation, molded directly to the assembled and lasted upper in a single step. When the soling compound is introduced into the mold in liquid form, the process is often called "direct injection molding." *See,* T.D. 83–116. HRL 089964 dated December 6, 1991, held that both, footwear with pre-formed bottoms *and* footwear with direct or simultaneous molded bottoms were in-

cluded within the scope of the term "unit molded footwear" as used in the seventh guideline for foxing-like bands. The language used in T.D. 83–116 was clear as to the scope of the term "unit molded" bottoms and was never qualified in any manner.

Additionally, where the shoe has varying amounts of vertical overlap along the perimeter of the shoe, the "high point" rule may come into effect. The "high point" rule had its origin in HRL 069886 dated June 22, 1983, which was published as C.S.D. 83103, 17 Cust. Bull. 948 (1983). This ruling set forth an interpretation of the phrase "soles which overlap the upper other than at the toe or heel." It reads in pertinent part as follows:

> It is our position that the phrase "soles which overlap the upper other than at the toe or heel" should be interpreted in the light of the following criteria:
>
> (1) The sole must extend over and cover part of the upper.
>
> (2) In measuring overlap when the overlap is uniform, only one cut is to be made in the shoe and that cut is to be made at the edge where the ball of the foot would normally rest. If the overlap is not uniform, the cut should be made at the point where the greatest amount of overlap occurs.
>
> (3) A sole will be considered to overlap the upper if a vertical overlap of 1/16 inch or more exists from where the upper and the outsole initially meet measured on a vertical plane. If this vertical overlap is less than 1/16 inch, the sole is presumed not to overlap the upper.

Briefly, this rule means that when the degree of vertical overlap on a unit molded bottom varies, the amount of vertical overlap is considered to be at the "highest point." The application of the "high point" rule is reasonable in situations where variations in the amount of overlap on unit molded footwear makes measurement of overlap impractical due to the amount of cutting necessary to make such a determination. However, the "high point" rule is not used in cases where a separate sole sample is submitted with a sample of the completed shoe. *See,* HRL 088510 dated April 29, 1991. It should be noted that the unattached sole sample must be the same style sole as attached to the completed shoe. *See,* HRL 950760 dated March 12, 1992. Moreover, the "high point" rule should not be applied where it can be determined without much difficulty that a 1/4 inch overlap by the sole encircles less than 40% of the perimeter of the shoe. It is Customs position that the "high point" rule should be primarily relied on in those situations where there are multiple variations in the amount of overlap and measurement would require numerous cuts at various places along the perimeter of the shoe. For example, in HRL 950759 dated March 18, 1992, we found that the "high point" rule should not be applied because there was only one variation (a wave) in the amount of overlap.

If the vertical overlap is less than required as stated above, the footwear is presumed not to have a foxing-like band. However, once the proper overlap measurement is verified Customs determines whether

the overlap "substantially encircles" the perimeter of the shoe. When the overlap falls within the 40–60% range Customs analysis is not terminated. Customs proceeds to examine whether the band has the same or nearly the same appearance, qualities, or characteristics as a foxing band appearing on a traditional sneaker or tennis shoe. In otherwords, Customs examines whether the overlap has the appearance and function of a foxing band.

Customs has found foxing-like bands on shoes where the 1/4 inch or more overlap encircles only slightly more than 40% of the perimeter of the upper. The reason for this is that most of those shoes have the appearance of foxing when all or most of the 1/4 inch overlap is visible because it is at the front, outside, or the back of the shoe. Additionally, the band functions as a foxing when it acts to reinforce or supplement the juncture of the sole and the upper.

For further information concerning this or any other footwear issue, Import Specialists at the various Customs districts or the National Import Specialists for footwear at the New York Seaport may be contacted. Furthermore, importers and other interested parties may avail themselves of the binding rulings program pursuant to Part 177, Customs Regulations (19 CFR Part 177).

Conclusion

After careful consideration of all the comments and following further review of the matter, Customs has concluded that its interpretation of "substantially encircle" as it relates to "foxing and foxing-like bands" need not be changed. The application of the 40–60% rule to determine whether a band "substantially encircles" the perimeter of a shoe is being uniformly applied by the various ports in accordance with the above analysis. Additionally, to ensure uniformity of the implementation of the 40–60% rule, it is subject to review by the National Import Specialist for footwear and when appropriate by Customs Headquarters.

Dated: November 10, 1992.

HQ 952426

Harvey B. Fox,
Director,
Office of Regulations and Rulings.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Decisions of the United States Court of International Trade

(Slip Op. 92–198)

FLORAL TRADE COUNCIL, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–07–00536

(Dated November 3, 1992)

JUDGMENT

RESTANI, *Judge:* This case having been submitted for decision and the Court, after deliberation, having rendered a decision therein; now, in conformity with that decision,

IT IS HEREBY ORDERED: that as no objections to the remand results were received, the determination on remand is affirmed.

(Slip Op. 92–199)

SKF USA, INC., AB SKF, SKF GMBH, SKF GLEITLAGER GMBH, SKF FRANCE, SARMA, RIV-SKF INDUSTRIE, S.P.A., SKF SVERIGE, AB, AND SKF (U.K.) LTD., PLAINTIFFS *v.* U.S. DEPARTMENT OF COMMERCE AND BARBARA HACKMAN FRANKLIN, SECRETARY, U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 89–06–00330

Plaintiffs move pursuant to Rule 56.1 for partial judgment on the agency record claiming that the Department of Commerce, International Trade Administration's ("Commerce") use of the "best information available" rule in its final determinations was unsupported by substantial evidence on the record and not in accordance with law. Defendants claim that this issue is now moot since Commerce has completed the first administrative reviews of all of SKF's merchandise covered by the antidumping duty orders.

Held: This issue is moot as there is no longer a case or controversy at issue since the first administrative reviews have been completed.

[Plaintiffs' motion denied; case dismissed.]

(Dated November 5, 1992)

Howrey & Simon (*Herbert C. Shelley, Alice A. Kipel* and *Lauren D. Frank*) for plaintiffs.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jeanne E. Davidson* and *A. David Lafer*); of counsel: *Dean A. Pinkert*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendants.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, Wesley K. Caine, David Scott Nance, Geert DePrest, Myron A. Brilliant* and *Christopher J. Callahan*) for defendant-intervenor.

OPINION

TSOUCALAS, *Judge:* Pursuant to Rule 56.1 of the Rules of this Court, plaintiffs, SKF USA, Inc., AB SKF, SKF GmbH, SKF Gleitlager GmbH, SKF France and SARMA, RIV-SKF Industrie, S.p.A., SKF Sverige, AB and SKF (U.K.) Limited (collectively "SKF"), move for an order granting partial judgment upon the agency record challenging the administrative determinations of the United States Department of Commerce, International Trade Administration ("Commerce" or "ITA"), in *Final Determinations of Sales at Less than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts thereof From The Federal Republic of Germany,* 54 Fed. Reg. 18,992 (1989); *Final Determinations of Sales at Less Than Fair Value; Antifriction Bearings (Other Than Spherical Plain and Tapered Roller Bearings) and Parts Thereof, From Italy; and Final Determination of Sales at Not Less Than Fair Value; Spherical Plain Bearings and Parts Thereof, From Italy,* 54 Fed. Reg. 19,096 (1989); *Final Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Needle Roller Bearings, Spherical Plain Bearings and Tapered Roller Bearings and Parts Thereof From Sweden; and Final Determinations of Sales at Not Less Than Fair Value: Needle Roller Bearings and Spherical Plain Bearings, and Parts Thereof, From Sweden,* 54 Fed. Reg. 19,114 (1989).

Specifically, the instant action addresses Count III of plaintiffs' amended complaint which claims that commerce's application of best information available ("BIA") was unsupported by substantial evidence and not in accordance with law.

Defendants claim that this issue is now moot since Commerce has completed the first administrative reviews of all of SKF's merchandise covered by the antidumping duty orders and thus any challenge to the use of BIA in the original investigation would, if successful, only lower the antidumping duty deposit rate established in the investigations; it would not eliminate the antidumping duty order itself.

It is well-established that an "actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *See Roe v. Wade,* 410 U.S. 113, 125 (1973); *see also SEC v. Medical Comm. for Human Rights,* 404 U.S. 403, 407 (1972).

In *PPG Industries, Inc. v. United States,* 11 CIT 303, 660 F. Supp. 965 (1987), Commerce completed an administrative review pursuant to 19 U.S.C. § 1675(a) before the court rendered its decision in a challenge to the final determination in an investigation. In that case, the court granted the government's motion to dismiss based on mootness claiming that the issues presented in the actions challenging the original countervailing duty determination were rendered moot upon the completion and the issuance of the results of the 751 review proceeding. *Id.* at 315, 660 F. Supp. at 974. The court stated that

> any remand directing the ITA to alter the amount of deposit rates determined in the final affirmative countervailing duty order, after the 751 review has already been published establishing the coun-

> tervailing duties to be assessed or deposited on future entries, would be futile since the remand could never affect the amount of the actual countervailing duty assessments nor the deposits of estimated duties.

Id. at 309, 660 F. Supp. at 970.

Similarly, in *Silver Reed America, Inc. v. United States,* 9 CIT 221 (1985), the Court vacated its remand order to Commerce for recalculation of dumping margins because of the publication of the administrative review determination. Therefore, a recalculation of dumping margins on remand would have no prospective effect regarding actual duty assessments of deposits of estimated duties.

In the case at hand, Commerce has completed the first administrative reviews. Therefore, if the Court were to decide this case, it would be rendering an advisory opinion which it is not at liberty to do. *See McKechnie Bros. (N.Z.) Ltd. v. United States Dep't of Commerce,* 14 CIT ___, ___, 735 F. Supp. 1066, 1068 (1990); *The Torrington Co. v. United States,* 16 CIT ___, ___, Slip Op. 92–167 at 4 (Sept. 25, 1992).

The courts have recognized an exception to the mootness doctrine when an issue is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515 (1911); *Roe,* 410 U.S. at 125; *DeFunis v. Odegaard,* 416 U.8. 312, 319 (1974). Plaintiff's claim that the case at hand falls within this exception as the "unlawful" BIA rates could be repeated in later administrative reviews. *Reply Brief of SKF Plaintiffs in Support of Motion for Partial Judgment Upon An Agency Record* at 5–6. The Court agrees that this issue is capable of repetition, but not that it will evade review. In *PPG Indus. Inc.,* the court ruled that an issue of ITA methodology will not evade judicial review, since a final affirmative determination decides only whether an Order should issue an estimation of duty rates. *PPG Indus. Inc.,* 11 CIT at 314–15, 660 F. Supp. at 974. In contrast, an administrative review covers the actual assessment of duties. Subsequent to such review, all parties are afforded the opportunity to "challenge the actual assessment of duties and estimated deposit duties as well as the methodology employed by the ITA." *Id.* Furthermore, SKF will suffer no harm if estimated duties determined in the original investigation were too high, since any estimated duties found to be overpaid will be refunded with interest pursuant to 19 U.S.C. § 1677g (1988 and 1992 Supp.). Therefore, this case is deemed moot and is hereby dismissed.

Conclusion

Plaintiff' motion for partial judgment on the agency record is dismissed since Commerce's completion of the first administrative reviews of all SKF merchandise covered by the antidumping duty orders renders this issue moot. Therefore, as the court has decided all other issue in this action, this case is dismissed in all respects.

(Slip Op. 92–200)

NACHI-FUJIKOSHI CORP. AND NACHI AMERICA, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND FEDERAL-MOGUL CORP. AND TORRINGTON CO., DEFENDANT-INTERVENORS

Court No. 91–08–00595

(Dated November 5, 1992)

TSOUCALAS, *Judge:* This Court having remanded this case to the Department of Commerce, International Trade Administration ("Commerce"), on July 16, 1992 for correction of certain errors in the final results; and those corrections having been made, it is hereby

ORDERED that Commerce's remand results are affirmed; and it is further

ORDERED that this case is dismissed in all respects.

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